Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. ~~965815~~ 96-5185

COMBINED COMPANIES, INC., et al,	:	
Plaintiffs	:	#45
vs	:	
AT&T CORPORATION,	:	
Defendants	:	

TRANSCRIPT OF TAPE RECORDING

Tuesday, April 30, 1996
United States Courthouse
Philadelphia, Pennsyvania

B E F O R E:

HONORABLE WALTER K. STAPLETON, U.S.C.A.
HONORABLE ANTHONY J. SCIRICA, U.S.C.A.
HONORABLE JOSEPH F. WEIS, JR., U.S.C.A.

right there.

MR. CARPENTER: All right.

THE COURT: Explain to me, your friends across the way, or at least some of your friends across the way say that these shortfall charges you're talking about are illusory because these contracts were entered into before June 19, either June 19 or June 17 --

MR. CARPENTER: Right.

THE COURT: -- 1994 and that makes all the difference in the world.

MR. CARPENTER: Right.

THE COURT: Now, can you explain why you don't think they are illusory?

MR. CARPENTER: Yes, I will explain that. Let me just say as a preliminary matter that that wasn't the ground of the District Court's decision. His ground was that these things weren't real concern of ours, but they're quite wrong that these commitments are illusory.

First of all, whether they're pre-June 1994 or post-June 1994, there's a shortfall liability if you don't meet your minimum during the annual period.

What they're talking about is their ability to engage in what they call restructuring, which means they terminate one service plan and start up another one with a new start date.

MR. MEANOR: May it please the Court, I'm H. Curtis Meanor. I represent all the plaintiffs' appellees except the one Mr. Yeskoo represents, Combined Companies.

I think that I would like to start by correcting what I will call two rather patent errors in the reply brief of AT&T. On page 20 of that reply brief AT&T states (inaudible) authority that a taping of a telephone conversation between Alfonse Inga and their account representative Andrea Anton was illegal. Mr. Inga is the principal and owner of the clients I represent.

This is a misrepresentation of the easily discovered law. Such taping by a party to the conversation, even without the consent of the other party or parties to the conversation, is neither illegal under federal law or New Jersey law. The prevailing statutes are NJSA 2A:156-4D and 18 United States Code, Section 2511(2)(d).

I stress this because, as I think we will develop later in this argument in the Anton taped telephone conversation, and the letter that Andrea Anton sent to Mr. Shipp, who is the principal of Combined Companies, thereafter, is very important to a resolution of one of the issues in this case, and that is the

alleged shortfall claim by AT&T and whether or not it's illusory to pursuant to Judge Stapleton's initial question.

I would also point out that on page 7 of its reply brief that AT&T seeks to draw some adverse inference not clearly articulated by stating that we, the appellees, failed to appeal from the two orders of Judge Politan referring what is the core issue of this case to the FCC. Those are his orders of May 19, 1995 and March 5, 1996.

It seems rather clear to us that this Court's decision in Richmond versus Sprint, 953 of Federal Second 1431, it decrees that we could not appeal those orders or that -- those orders. And that Richmond decision is cited in Judge Politan's opinion.

I think it is inappropriate for AT&T to have accused us of these derelictions without showing -- any showing of authority that we could have done what we were accused of not doing or did illegally what we certainly did legally.

AT&T claims in response to argument on page 19 of its reply regarding plan restructuring that once a plan is restructured it becomes a new plan, and if the restructuring took place after June 17, 1994, shortfall penalties are then -- can be assessed pursuant

to tariffs that became effective on that day -- new tariffs became effective on that day.

This is an argument made on appeal for the first time. It will not be found in the record and it was not before Judge Politan and, therefore, it is our position that that question is not properly before this Court.

It was advanced for the first time in the reply brief, and I think for the clear cut purpose of trying to prevent us from replying to it accept at ~~all~~ oral argument.

THE COURT: Wait a minute. I'm confused. I thought it was you folks this raised the issue first in your brief saying that these contracts were -- these shortfall charges are illusory because these were pre-June 1994 --

MR. MEANOR: That is --

THE COURT: -- and that they were responding to your assertion?

MR. MEANOR: No.

THE COURT: No?

MR. MEANOR: No.

THE COURT: Okay.

MR. MEANOR: These plans were are all pre-June 17, 1994 plans. Their numbers were given to

them before June 17, 1994. They pre-exist the date of the new tariffs effective June 17, 1994, which permits for the first time on a restructuring for shortfall penalties to continue to exist.

My understanding of it is that with respect to plans that pre-date June 17, 1994, and it's not a simple subject. It's explained in various certifications to Mr. Inga and Mr. Shipp that if you restructure the plan you can fold or put your unused portion of service into a succeeding plan.

It really is, I think, to put it in terms maybe a little easier to understand, an amendment to the contract that permits an extension to utilize the volume of traffic to which you have theretofore committed. That's about the simplest way I can put it.

We have consistently maintained in this case that since these plans pre-dated June 17, 1994, they are subject to restructuring without shortfall penalty and we can fold or extend -- fold the unused portion into a restructured amended plan without penalty and use that portion in the future that we haven't used had we committed to in the past.

Judge Weis THE COURT: Couldn't the FCC resolve that question?

MR. MEANOR: Could the FCC resolve that

question? Yes. But I think, if I could have a couple of minutes, I can establish that AT&T has already resolved the question against itself.

The result. There is the taped conversation of Andrea Anton. It followed a representation in a communication by letter to Judge Politan that Combined Companies was in shortfall for $3.3 million and that AT&T was about to sue CCI for that shortfall.

Mr. Inga talked to Ms. Anton. The shortfall was asserted to be in plans numbered 2430 and 3124. It is clear from Ms. Anton's transcribed telephone conversation and the following letter -- that's -- AA 1372 is the letter -- that AT&T is not going to assert that shortfall penalty against CCI.

And we are correct in saying that these plans are not subject to shortfall penalty if properly restructured, and our clients know how properly to restructure them. I think we can establish that by some exhibits AT&T has included in its appendix. These plans, these two plans, plan numbers 2430 and 3124, and no one will dispute were started, begun, entered into prior to June 17, 1974.

If you will look at the exhibits to the certification of a Carl Williams who was a witness for AT&T in this case in March of 1995, and they -- appendix

pages are AA663 and AA1262, these show the start dates of these two plans I've been talking about.

The first exhibit, the one on page 663 shows that plan number 3124 has a start date of October 1994 and plan number 2430 has a start date of August 1994.

The second page that I referred to, page 1262 shows that 3124 has a start date of May 1995 and 2430 a start date of July 1995.

This means simply one thing. Both of these plans have been restructured twice since June 17, 1994 and yet AT&T has stated in writing through its own business executives, not its lawyers, that it will not assert shortfall penalties on these plans.

It is quite clear from this that AT&T cannot legitimately assert shortfall penalties on these plans if they are subject to proper restructuring as they have been and may be in the future.

THE COURT: How about Judge Weis' question? I mean, assuming that there's merit to your argument, this sounds, as you say, it's a pretty complex matter. You used those words. If it's a pretty complex matter, wasn't the district judge right in saying this is for a matter for the FCC?

This is not for mere judges to conduct this economic analysis and decide whether it is in the public

interest to have restructuring or not to have restructuring?

MR. MEANOR: Yes, and we and the district judge were led by AT&T to believe that after Judge Politan's decision on May 19, 1995, because of the then existing tariff transmittal 8179 before the FCC, we would get a prompt hearing on the meaning of Tariff II as it existed in January 1995 when these transfers of traffic were forwarded to AT&T.

THE COURT: Now, how long after Judge Politan's initial order did you learn that AT&T had fouled up the process by withdrawing this tariff?

MR. MEANOR: The withdrawal of 8179 took place two weeks after Judge Politan's initial order.

THE COURT: And when did you learn about it?

MR. MEANOR: Several weeks after that.

THE COURT: And you did nothing after that to go to the FCC --

MR. MEANOR: Yes, we did.

THE COURT: -- and say now here's our problem?

MR. MEANOR: No, we went back to Judge Politan and said the vehicle you relied on and we relied on to carry this issue to the FCC doesn't exist anymore. Therefore, please Judge you decide it.

Exhibit B

516. AT&T stonewalled CCI and refused to negotiate CCI's request for a contract tariff similar, but more favorable to AT&T, than Contract Tariff 516. See Exhibit 8.

II. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING THAT SHORTFALL CHARGES ARE UNREASONABLE AND VIOLATE 47 U.S.C. § 201.

Although Petitioners did not request in their Joint Petition a declaratory ruling that the shortfall charges tariffed by AT&T are unreasonable and so violate 47 U.S.C. § 201, the Commission chose to include the issue in its Public Notice. Petitioners do not object to the issue being addressed in this proceeding. (However, Petitioners would urge the Commission not to delay ruling on the original requests for declaratory rulings made by Petitioners in order to do so.) As noted in Petitioner's Joint Motion for Expedited Consideration, AT&T recently sent out bills to each of Petitioners' end users for hundreds, and in most cases, thousands of dollars in shortfall charges, or as AT&T referred to them on the bills, "true up charges" (examples at Exhibit 6 and 9).

AT&T claims that the Commission is precluded from declaring the charges unreasonable in this proceeding because a tariff may only be challenged in a complaint proceeding. It cites as authority for that proposition a 1932 ICC case, *Arizona Grocery v. Atchison, T.& S.F.R. Co.*, 284 U.S. 370, 384 (1932). *Arizona Grocery*, an ICC case decided before the enactment of the Communications Act of 1934, did not prescribe the precise type of proceeding the FCC, an agency not yet in existence, had to use in order to declare a tariff unlawful. In *In the Matter of American Telephone and Telegraph Company Petition to Rectify Terms and Conditions of 1985 Annual Access Tariffs*, 3 FCC Rcd 5071 (1988), AT&T challenged numerous provisions of the 1985 Access Tariffs. The Common Carrier Bureau opted to treat the filing as a petition for a declaratory ruling. The LECs attacked the nature of the proceedings, but were turned away by the Commission, which said: